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No. 80-556

In the Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL LIQUOR COMPANY, ET AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The Brief for the United States in opposition to this petition for a writ of certiorari argues for a rule without a reason.

The United States seeks to limit *Abney* v. *United States*, 431 U.S. 651 (1977) to the precise facts of Mr. Abney's case. This attempt to read a major decision of the Court "as Baron Parke would read a pleading", *United States* v. *Standard Oil Company*, 384 U.S. 224, 226 (1966), and to glide over the serious conflict among the Courts of Appeals by gossamer-thin distinctions, simply reinforces the obvivous importance of the need for review of this case.

The United States never comes to grips with the crucial issue here: all petitioners have been placed in jeopardy

through the empaneling and swearing of the jury, *Crist* v. *Bretz*, 437 U.S. 28 (1978) and the Court of Appeals was, therefore, clearly in error in dismissing these Double Jeopardy Clause appeals for want of jurisdiction. *See especially, Willhauch* v. *Flanagan*, ____ U.S. ____, 101 S.Ct. 10, 11-12 (1980) (Brennan, Circuit Justice) and *Crist, supra*, 437 U.S., at 38.

2. The government's argument (Br., p.5) that the possibility of acquittal by the jury could moot the double jeopardy questions here presented and, therefore, that these double jeopardy claims are not now ripe for appellate adjudication (*id.*) is no more than a restatement of the government's argument in *Abney*. *See, Abney* v. *United States*, No. 75-6521, O.T. 1976, Brief for the United States, p. 37:

> "A double jeopardy claim is simply one reason why there should be no conviction. If the district court errs in favor of the government, its error can be corrected (if a conviction ensues) by reversal on appeal."

The argument did not prevail in *Abney*, and should not prevail here.

3. The government relies heavily upon *United States* v. *MacDonald*, 435 U.S. 850 (1978). This is odd, for *MacDonald* proves the need for review here. In *MacDonald*, the Court of Appeals for the Fourth Circuit held that "[t]he denial of MacDonald's plea of double jeopardy . . . is a proper subject for interlocutory review. . . ." even though MacDonald had undergone *no* trial whatsoever. *United States* v. *MacDonald*, 511 F.2d 196, 199 (4th Cir. 1976). The Fourth Circuit ultimately placed its decision to dismiss the indictment on deprivation of MacDonald's right

to a speedy trial. This Court reversed the Fourth Circuit on that *Sixth* Amendment issue, 435 U.S., at 859-860, because

> "... *Unlike* the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this court, encompass a 'right not to be tried' which must be upheld *prior* to trial if it is to be enjoyed at all." (emphasis added)

Significantly, if the Court had wished to disapprove the Fourth Circuit's holding as to the immediate appealability of the Double Jeopardy Clause issue, it surely had the opportunity. *See especially, MacDonald,* 435 U.S., at 859, n.6. The Court did not do so. Thus, these petitioners' Double Jeopardy Clause claims *would* be adjudicated on the merits if presented to the Court of Appeals for the Fourth Circuit, but have been dismissed for want of jurisdiction because presented to the Court of Appeals for the Tenth Circuit. If *this* is not a conflict between the Circuits, what is?

4. The United States seeks to distinguish *United States* v. *Alessi,* 536 F.2d 978, 979-981 (2d Cir. 1976) and *United States* v. *Griffin,* 617 F.2d 1342, 1343-1346 (9th Cir. 1980), by limiting each to its precise facts (Br., pp.7-8). The attempt rings hollow. The reasoning of both *Alessi* and *Griffin* is, quite simply, that if the defendants were correct in their assertions, putting the defendants to trial on the *charges* contained in the indictment would, itself, violate the Constitution. In direct contrast, the Court of Appeals below expressly noted that petitioners relied upon *precisely* this rationale (Pet.App., p. A-6), 628 Fed. 1264, 1266 (10th Cir. 1980), and proceeded to reject it. *Id.* Again, if *this* is not a conflict between the Circuits, what is?

Indeed, if a defendant in a state court who has never been put to trial before any empaneled jury would have a ripe claim for *injunctive* relief under 42 U.S.C. §1983 the moment the jury is empaneled, as Mr. Justice Brennan strongly intimated in *Willhauch* v. *Flanagan, supra,* it follows, *a fortiori,* that the instant claims of violation of the Double Jeopardy Clause are ripe for adjudication and that the Court of Appeals erred in entering a jurisdictional dismissal. And, in light of the foregoing, it is apparent that the government's assertion that the "decision of the court of appeals [below] . . . does not conflict with any decision of this Court or any court of appeals" (Br. p.3) is an example of the wish being the father of the thought.

5. We take strong exception to the repeated assertions in the government's Brief in Opposition that there has been unwarranted delay on the part of either counsel for petitioners, or petitioners, in this case (Br., pp.3, 8, 9). The motions to dismiss this indictment on double jeopardy grounds were filed immediately after return of the indictment. Rule 12(b)(2), F.R.Crim.P. The merits of the motion were argued at length to the District Court at the first opportunity. The District Court ruled, solely on the authority of a divided panel of the Ninth Circuit in *Western Laundry & Linen Rental Company* v. *United States,* 424 F.2d 441 (9th Cir.) *cert. denied,* 400 U.S. 849 (1970), that the motions to dismiss must be denied, and that the order denying the Double Jeopardy Clause dismissal motions was a final order "for purpose of appeal". The Court expressly inquired whether there was then "anything left undone" (Transcript of Hearing, January 4, 1979, p.86, lns.19-20;

p.87, ln.4). The United States, represented by the Chief of the Regional Office of the Antitrust Division, stood mute. *Id.* Not until the first appeal in these cases, *United States* v. *Abraham,* No. 79-1017 and No. 79-1018 (10th Cir. 1979), *amended* (10th Cir.1979), *cert. denied,* 444 U.S. 866 (1979), did the government inject a jurisdictional issue into these appeals in an attempt to prevent an adjudication on the merits by the Court of Appeals.

Petitioners strongly believed the Court of Appeals' first disposition was untenable. Petitioners argued in their respective petitions for writs of certiorari in this Court that the decision should be vacated and the case remanded *for a prompt decision on the merits of the double jeopardy issue.* The government chose to oppose the granting of certiorari, for reasons best known to the government.

The experienced district judge to whom these cases were assigned on remand correctly held that, under the mandate of the first decision of the Court of Appeals, the double jeopardy question would become "ripe upon the empaneling of the jury in this case." (Pet.App., p.A-13, A-14). We note that the government does not now even suggest the District Court was incorrect on *this* point.

On November 16, 1979, the District Court began the process of attempting to select a jury to try this exceptionally emotional case. The case is emotional because the petitioners are wholesalers of alcoholic beverages. The question of whether *any* sale or consumption of alcoholic beverages should *ever* be allowed under any circumstances is an issue that has long aroused deep and fierce religious and moral passions among the people of the State of Oklahoma. For this reason, the process of jury selection was

extraordinarily laborious. Indeed, the District Court was required to excuse so many veniremen for reasons of religious conviction that *the venire was exhausted* on November 16, again on November 19, and a jury was not finally selected until late in the day on November 20, 1979.

In a meticulous application of the mandate of the Court of Appeals, the District Court then stated at a bench conference:

> "Let me observe for the record, at this time, that the jury has been empaneled in this case."

Petitioners thereupon renewed their double jeopardy dismissal motions. In an exceptionally conscientious effort to maintain a clear record, and, thus, obtain appellate review on the merits of the motions, the District Court then stated:

> "For the record, that is a renewal of the motion that was earlier made and appealed *and is now renewed following the empaneling of the jury in this case and the attaching of jeopardy.* Is that correct?"

The question was answered in the affirmative. This procedure was repeated as to each petitioner. The District Court then stated:

> "Now, for the benefit of the reviewing court, let me observe that the motions which have just been renewed have been *studied exhaustively by the court prior to this time in attempting to comply with the reasoning and the position of the Court of Appeals.*
>
> "I have empaneled this jury and permitted these motions to be renewed, *double jeopardy to you having attached,* and the motions having become *ripe for decision* [under the decision of the Court of Appeals]." (emphasis added)

At that point, notices of appeal were immediately presented and filed in open court (although, under Rule 4(b), F.R.A.P., the notices of appeal need not have been filed for a period of ten days). The District Court ruled that an immediate appeal was now proper, and stated:

> "For the further benefit of the reviewing court, let me also explain that the question of immediate appeal has been exhaustively studied, thoughtfully considered, prior to this time, and the explanation for my decision to permit the immediate appeal and the staying of the proceedings pending the appeal is also contained in the written order. . . ." (*United States* v. *Central Liquor Company, et al.*, Transcript, November 20, 1979, p.90, ln.17 - p.94, ln.4). (emphasis added).

The government moved to dismiss the appeals on jurisdictional grounds and the question was elaborately briefed in the Court of Appeals. The motion was denied by the Court of Appeals on March 4, 1980 (Pet.App., p.A-5, n.2). The government, however, was ultimately successful in obtaining yet another dismissal on jurisdictional grounds (Pet. App., p.A-8). That dismissal is presented for review here. It is the *government* which has brought an indictment that shows on its face it is vitiated by the Double Jeopardy Clause, and it is the government which has fought at each step of the proceedings to prevent adjudication on the merits of the Double Jeopardy claim in the Court of Appeals and in this Court.

Especially in light of the fact that the jury has been sworn, the exceptionally emotional nature of this case, and the consequent importance of the particular persons chosen as jurors, the government's assertion that "petitioners' re-

liance . . . on *Crist* v. *Bretz*, 437 U.S. 28 (1978) . . . is without basis" (Br., p.6, n.4), is astounding. The United States itself, in its Memorandum as Amicus Curiae in *Crist* v. *Bretz*, No. 76-1200, filed July 26, 1977, stated (pp.6-7):

> "In the federal courts jeopardy attaches when the jury is sworn. We do not seek to alter this rule, because *defendants may have important interests in the process of jury selection itself that are deserving of the constitutional double jeopardy protection.*"

We agree.

7. We take even stronger exception to the government's comments regarding "delay" in light of the government's own (successful) contention in *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 and n.4 (1979), that *if* a defendant believes a district court's denial of a motion to dismiss is "appealable before trial", *Helstoski, supra*, No. 78-546, O.T. 1978, Brief for the United States, p.91, the defendant *must* file a notice of appeal within "the jurisdictional time limit for appellate review" *id.* p.92, n.36, contained in Rule 4(b), F.R.A.P., or be denied *any* interlocutory review whatsoever, regardless of the correctness of the defendant's position as to both immediate appealability and the merits of his constitutional claim.

The assertion that counsel for petitioners should have disregarded a major precedent of this Court, deciding a vital issue of appellate procedure, handed down at the government's own urging, comes with ill grace.

CONCLUSION

The importance of the jurisdictional dismissal entered below is undeniable.

The irreconcilable conflict between (at least) the Fourth and Tenth Circuits on the jurisdictional issue presented here is explicit.

The conflict in principle between the Second, Fourth and Ninth Circuits on the one hand and the Tenth Circuit on the other is compelling.

The imperative need for "clarity . . . in matters of jurisdiction", *Serfass* v. *United States*, 420 U.S. 377, 384 (1975), is self-proving.

The petition for a writ of certiorari should be granted.

Respeectfully submitted,

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November, 1980

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that three (3) true and correct copies of the foregoing Reply Brief in Support of Petition for A Writ of Certiorari were mailed, by certified mail, postage fully prepaid, to all parties required to be served, to-wit, the Honorable Wade S. McCree, Jr., Solicitor-General, Office of the Solicitor-General, United States Department of Justice, Washington, D.C. 20530, this _____ day of November, 1980.

Bernard J. Rothbaum, Jr.